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Debtor in Possession *Pro Per*

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CLERK
U.S. BANKRUPTCY
DISTRICT OF ARIZONA

**IN UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF ARIZONA**

In re:

INGA MILLER,

Debtor and Debtor in Possession.

In Proceedings Under Chapter 11

Case No. 2:10-bk-24542-GBN

**MOTION TO DETERMINE VALUE AND STRIP OFF JUNIOR LIEN**

Re: 519 N. Brimhall St.
Mesa, AZ 85203

TO THE HONORABLE, GEORGE B. NIELSEN, JR., UNITED STATES BANKRUPTCY COURT JUDGE, THE SECURED CREDITOR, SECURED CREDITOR'S COUNSEL, THE TRUSTEE AND OTHER INTERESTED PARTIES:

Debtor, INGA MILLER, (herein referred to as "Debtor") in *pro per,* hereby moves this Court, pursuant to 11 USC 506 and Rule 3012 of the Federal Rules of Bankruptcy Procedure, to devaluate and strip off junior Deed of Trust, showing WELLS FARGO (Claimant) as the Lender, on the property commonly known as: 519 N. Brimhall St., Mesa AZ 85203 and more fully described as:

> Lot 33, Esther Place, According to Book 42 of Maps, Page 50, Records of Maricopa County, Arizona

and state as follows:

Debtor moves this Court for an order stripping off junior creditor's lien and to treat said creditor's claim as unsecured and not for the purposes of hearsay and/or delaying any proceedings. Debtor states that the basis for the lien stripping is lack of equity in the encumbered property. This Motion is based more particularly on the following Memorandum of Points and Authorities.

RESPECTFULLY submitted this: Oct 29, 2010

INGA MILLER
Debtor in Possession *Pro Per*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. JURISDICTION

1. Jurisdiction is conferred on this Court pursuant to the provisions of 28 USC 1334 in that this proceeding arises from and is related to the above captioned matter under Title 11;

2. This Court has both personal and subject matter jurisdiction to hear this case pursuant to 28 USC 1334 and 28 USC 157(b)(2), respectively;

3. This is a core proceeding under 28 USC 157(b)(2);

4. Venue lies in this District pursuant to 28 USC 1391(b);

## II. FACTS

1. This case was commenced by the filing of a voluntary petition under Chapter 11 of the Bankruptcy Code (11 U.S.C.) on August 4, 2010. At that time, Debtor owned and leased subject property for income producing purposes.
2. The property is encumbered by two liens. Senior lien in the amount of $70,040 and junior lien in the amount of $95,655.03.
3. Debtor's current estimated Fair Market Value of the subject real property, as listed on Schedule A, is $20,000. (Debtor is in the process of obtaining an order from this Court to hire a professional appraiser.)
4. Claimant/Junior Lienholder, WELLS FARGO, estimates the value of subject property at $43,000, as listed on their Proof of Claim #3.
5. The Debtor does not claim an exemption of $150,000 in said property as it is not Debtors primary residence and is subject to 11 USC 506.
6. The property has not been abandoned.
7. All real estate taxes and property insurance are paid up to date.

## III. LEGAL ARGUMENT

Debtor makes this motion under F.R. Bankr. P. 3012 which provides:

> "The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct."

Section 506(a) of the U.S. Bankruptcy Code provides that a secured claim is secured only to the extent of the value of the collateral, and unallowed secured claims are void. Specifically, 11 USC 506(a)(1) and (d) provide in pertinent part:

> (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest. . .
>
> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . ."

Thus, if a Debtor can demonstrate that the value of Debtor's income property is less than senior liens, a junior lien will be determined to be wholly unsecured and thus subject to being avoided.

In this case, the value of Debtors' property is less than senior lien amount of $70,040. The junior Lienholder is no longer the holder of a "secured claim" per 11 USC 506(a) as no equity exist after the Senior Lienholders interest. Claimant has no value interest whatsoever in the Debtor' property securing its alleged claim in the amount of $95,655.03. Thus the junior lien of the Claimant is wholly unsecured and can be avoided or "stripped" under 11 USC 506(d). Therefore, the junior lien should be treated as an unsecured debt and paid as an unsecured debt in Debtor's Chapter 11 plan.

Proceedings to strip wholly unsecured deeds of trust are proper via motion or plan provision. See *In Re Pereira*, (08-03059) Southern District of California 8/28/08; *In Re Millspaugh*, 302 B.R. 90, 2003 Bank. LEXIS 1779 (Bankr. D. Idaho 2003).

The avoidance of the lien shall be contingent upon the Debtor completing Chapter 11 Plan and the Debtor's receipt of a Chapter 11 discharge. Upon receipt of the discharge and completion of the Plan, the Order may be recorded by the Debtor with the Maricopa County Recorder's Office. The Claimant shall retain its claims for the full amount due under the subject loan in the event of either the dismissal of the Debtors' Chapter 11 case or the conversion of the Debtors' case to any other chapter under the United States Bankruptcy Code.

WHEREFORE, Debtor, INGA MILLER, respectfully prays for relief as follows:

1. That the junior deed of trust of WELLS FARGO secured by Debtors' real property located at 519 N. Brimhall St., Mesa, AZ 85203 be determined to be completely unsecured; and

2. That any corresponding proof of claim filed by WELLS FARGO be deemed a general unsecured claim and paid as an unsecured debt within Debtors' Chapter 11 Plan; and

3. The avoidance of the lien shall be contingent upon the Debtor completing her Chapter 11 Plan and the Debtors' receipt of a Chapter 11 discharge. Upon receipt of the discharge and completion of the Plan, the Order may be recorded by the Debtor with

the Maricopa County Recorder's Office. The respondent shall retain its claims for the full amount due under the subject loan in the event of either the dismissal of the Debtors' Chapter 11 case; and

4. For such other relief as the Court deems proper.

RESPECTFULLY submitted this date: Oct 29, 2010.

INGA MILLER
Debtor in Possession *Pro Per*

ORIGINAL filed with US Bankruptcy Clerk
And COPY of the foregoing hand-delivered
10/29/10 to:

U.S. Trustee, Department of Justice
230 N. First Ave, Ste 204
Phoenix, AZ 85003

Jennifer A. Giaimo, Office of the U.S. Trustee
230 N. First Ave, Ste 204
Phoenix, AZ 85003
(Attorney for the U.S. Trustee)

Mailed first class mail, postage prepaid, to:

WELLS FARGO BANK, N.A.
HOME EQUITY GROUP
X2303-01A-1 HOME CAMPUS
DES MOINES, IA 50328-0001

INGA MILLER